

The last three kinds of jurisdiction do not apply, and so, if at all, only jurisdiction of kind (a) applies, which is governed, as regards criminal matters, by section 50(1) of the Courts of Judicature Act, 1964, which, as amended by Act A328, reads:

"50 (1) The Federal Court shall have jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of —

(a) its original criminal jurisdiction; or

(b) its appellate criminal jurisdiction in respect of an appeal from a decision of a president of a Sessions Court who is conferred with special jurisdiction under subsection (3) of section 63 of the Subordinate Courts Act, 1948,

subject to this or any other written law regulating the terms and conditions upon which criminal appeals may be brought."

By no stretch of the imagination can it be said that the accused's application comes within the above, seeing that what he is dissatisfied with is a refusal by the learned High Court judge to grant a certificate under section 66 of the Courts of Judicature Act.

Finally, if it is true that this court is now as regards criminal matters on a par with the Privy Council, it is not true to say that Parliament has not abolished the subject's right to appeal to the Yang di-Pertuan Agong. Legally, an appeal to London is not an appeal to the Privy Council but one to the Yang di-Pertuan Agong, as is clear from the old subsection (2) of section 74 of the Courts of Judicature Act, 1964, which read:

"(2) An appeal shall also lie from the Federal Court to the Yang di-Pertuan Agong in the following cases, namely:

(a) in any case mentioned in sub-section (1) of this section where the leave of the court has not been duly obtained; and

(b) in any case arising in a civil matter other than the cases referred to in sub-section (1); and

(c) in any criminal matter,

where application for special leave to appeal has been made to the Yang di-Pertuan Agong, and the Yang di-Pertuan Agong, acting on the recommendation of the Judicial Committee, has granted special leave to appeal."

When Parliament by Act A328 deleted the words "in any criminal matter" in paragraph (c), they clearly showed that they intended to abolish the right of the subject to make a last appeal to *His Majesty*.

For the above reasons we were of the opinion that a person cannot appeal from the decision of a High Court judge dismissing his application under section 66, and accordingly dismissed this application.

Application dismissed.

Solicitors: *N. Ramachandran & Co.*

CHAI YEN v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION

[F.C. (Raja Azlan Shah Ag. C.J. (Malaya)), Wan Suleiman and Chang Min Tat F.J.J.) May 31 and August 16, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 143 of 1976]

Practice and procedure — Appeal — Time for appeal — Order made in chambers — Whether time runs from the date of the order or of the decision not to require further arguments — R.S.C. 1957, O. 54 r. 22A — Federal Court (Appeals) (Transitional) Rules, 1963.

In this case the respondents had obtained an order in chambers for the sale of certain lands charged by the appellant to the respondents under the National Land Code. The order for sale was made on September 6, 1976 after the learned judge had heard and considered certain contentious arguments. The sale was fixed for December 12, 1976. The appellants applied on September 8, 1976 to the judge for further arguments but it was on October 14, 1976, that the learned judge decided that he did not require further arguments and to issue a certificate to that effect. Notice of appeal was filed and served on the respondents on November 1, 1976. It was argued that the appeal had not been brought before the Federal Court within the meaning of rule 13 of the Federal Court (Appeals) (Transitional) Rules, 1963 as notice of appeal was filed and served more than one month from the date of the order appealed from.

Held: in the case of an order made in Chambers in which an application under Order 54 rule 22A had been lodged within time, the time to appeal would run from the date, not of the order but of the decision not to require further arguments, and on the facts of this case, the appeal had been properly brought to the court.

FEDERAL COURT.

G.T. Rajan for the appellant.

K. Thayalan for the respondent.

Chang Min Tat F.J. (delivering the judgment of the Court): A preliminary objection is taken to this appeal by the respondents who argue that the appeal has not been brought before the Federal Court within the meaning and scope of rule 13, Federal Court (Civil Appeals) (Transitional) Rules 1963. The argument is founded on the fact that the notice of appeal was filed and served more than one month from the order now appealed from and the appeal cannot now lie in this court without the special leave of the full court and of this leave, there is none and none is being applied for.

The relevant order is an order for sale of certain lands charged by the appellant to the respondents under the National Land Code. The application for foreclosure was made in an originating summons and consequently heard in chambers. The order for sale was made on September 6, 1976, after the learned judge had heard and considered certain contentious arguments. The sale was fixed for December 12, 1976. Notice of appeal was filed in court on November 1, 1976, and a copy thereof was served on the respondents on the same day, considerably more than the one month specified.

Had the matter stopped here, this court will have, on the present rules and on the authority of its previous and other decisions from which it can see no valid reason to depart, no other course than to rule that there is no appeal before it. But counsel for the appellant asks us to consider the effect of the application for further arguments which the appellant made by letter dated September 8, 1976, well within the 4 days allowed under Order 54 rule 22A Rules of the Supreme Court. He contends that such an application has the practical effect of making what may be a final order not a final order for the purposes of lodging the notice of appeal. He draws the attention of this court to the fact that the learned judge only decided on October 14, 1976 not to require further arguments and to issue a certificate to this effect on the same date. Necessarily therefore, filing

of the notice of appeal and service thereof, even if effected immediately after October 14 (which they were) must be more than 1 month from the order appealed from.

The answer of counsel for the respondents is that as from September 6, 1976, the appellant could avail herself of the procedure under this rule and order, but it was not mandatory for her to do so. She could proceed on appeal without going through the process of making further arguments. With respect, this answer appears to require prescience which litigants or counsel should be well advised to have, if they were not to have to meet objections of every possible nature and form. Unfortunately however such prescience is often only hind-sight. Further arguments may well not be mandatory, but they are available and if a litigant, for good reasons, one of which appears clearly to be the saving of costs, chooses to avail herself of them, then she should not be shut out of further process, if this process has to be taken.

On a fuller consideration, we are of the view that however final in terms the order of September 6, 1976, may be, in practical effect, it could not be acted upon until the decision of the learned judge on the further arguments or his decision not to require further arguments was made known. He could have heard such further arguments and then he could confirm his previous decision or revoke it or make such further or other order as he deemed just. In the latter event and in the event he decided not to hear further arguments, the fact that the order made in chambers had been drawn up and perfected (as this one was) would have no significance. If on the other hand, he decided to confirm the order, the sale would take place unless an appeal was filed and a stay ordered. But if on the day fixed for the sale of the charged lands, he had not made known his decision to confirm the order, then quite clearly the sale could not be carried out, and it would have to be adjourned till such time as his decision was made known. The same position would be arrived at, if by that time, he had not made known his decision on the further arguments or he had not decided whether to hear further arguments. In other words, the situation stagnated until his decision one way or the other was made known. The matter could only proceed from his decision. Clearly then, in the case of a decision not to require further arguments, the process of appeal could only commence from the date of his decision.

We therefore rule that in the case of an order made in chambers in which an application under Order 54 rule 22A has been lodged within time, the time to appeal runs from the date, not of the order but of the decision not to require further arguments, and that on the facts of this case, an appeal has been properly brought to this court.

The preliminary objection is dismissed with costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; Skrine & Co.*

LEN OMNIBUS CO. BHD. v. NORTH SOUTH TRANSPORT SDN. BHD. & ANOR. AND ANOTHER APPEAL

[F.C. (Raja Azlan Shah Ag. C.J. (Malaya), Wan Suleiman and Chang Min Tat F.J.J.) May 31 and August 19, 1978]
[Kuala Lumpur — Federal Court Civil Appeals
Nos. 223 and 226 of 1977]

B *Tort — Negligence — Nuisance — Head-on collision between bus and lorry — Rubber tree falling across road — Motor lorry travelling on incorrect side of road — Whether duty of bus driver to stop or avoid accident — Whether owner of estate on which rubber tree stood liable because of negligence or nuisance — Nuisance to highways — Duty of owner of adjoining land.*

C In this case there had been a head-on collision between the appellant's motor bus and the respondent's motor lorry. A rubber tree had fallen in a storm and was lying across the motor lorry's side of the road. The other side on the motor bus's side was clear. It appeared that the collision occurred as a result of the lorry travelling on its incorrect side in an attempt to proceed past the fallen tree. The learned trial judge found that the driver of the lorry was negligent in doing so in complete disregard of the presence of the bus which was on its correct side of the road. He held however that the driver of the motor bus was also negligent as he ought to have stopped the bus on seeing that the lorry had begun to encroach into its path. He held that the lorry-driver was 75% to blame and that the bus-driver was 25% to blame. The learned trial judge also held that the third party, the owner of the rubber tree, was exonerated from blame. The parties appealed to the Federal Court.

D **Held:** (1) on the facts the lorry driver was wholly to blame for the accident;

E (2) the learned judge should not have held that it was negligent of the bus driver not to have stopped his vehicle some distance back when he saw the lorry coming towards him on its incorrect side of the road nor should the bus driver be regarded as blameworthy in not going to the left grass side table in an endeavour to let the lorry pass;

F (3) the learned judge was wrong in his finding and in that exceptional situation the appeal court was justified in interfering with his apportionment of liability;

G (4) an estate owner who had rubber trees growing on his estate adjoining the highway was not expected to possess scientific knowledge of diseases that might affect the trees but he would be expected as a reasonable and prudent landowner to inspect the trees from time to time to assess their safety and if there was a danger of one of those trees falling on the highway, and possibly injuring someone who was using the highway, it was his duty to have that tree removed which was found to be dangerous;

H (5) if a tree adjoining a highway fell on the road without any negligence on the part of its owner, and the said tree caused an obstruction to the said highway, it was wrong to suppose that *ipso facto* and immediately a nuisance was created. The keynote of his responsibility would be knowledge or means of knowledge. Thus nuisance would be created if, knowing or having the means of knowing of its existence, he allowed it to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that obstruction had come into existence could not overnight turn it into a nuisance;

(6) on the facts of this case the evidence did not show that the estate owner was negligent or that he could be made liable in nuisance.

I Cases referred to:-

- (1) *K.R. Taxi Service Ltd. v. Zaharah* [1969] 1 M.L.J. 49.
- (2) *Govinda Raju v. Laws* [1966] 1 M.L.J. 188.
- (3) *Lim Kar Bee v. Abdul Latif bin Ismail* [1978] 1 M.L.J. 109, 119.
- (4) *U.S. Shipping Board v. Laird Line Ltd.* [1924] A.C. 286, 291.
- (5) *Ramoo v. Gan Soo Swee & Anor* [1971] 1 M.L.J. 235, 239.